(2)

Supreme Court, U.S.
FILED
DEC 4 1997
CLERK

No. 97-676

In The

Supreme Court of the United States

October Term, 1997

DEBRA J. FORD,

Petitioner,

vs.

EDGAR LAWRENCE, in his official capacity as the Executive Director of Plumbers & Gas Fitters Examining Board and in his individual capacity; LEWIS MOORE, in his official capacity as Chairman of the Plumbers & Gas Fitters Examining Board and in his individual capacity; MICKEY DRUMMOND, in his official capacity as vice-chairman of the Plumbers & Gas Fitters Examining Board; GERALD SMITH, in his official capacity as Secretary of the Plumbers & Gas Fitters Examining Board; JOHN RILEY, in his official capacity as a member of the Plumbers & Gas Fitters Examining Board; DANNY PRICE, in his official capacity as a member of the Plumbers & Gas Fitters Examining Board; DAVID LECROY, in his official capacity as a member of the Plumbers & Gas Fitters Examining Board; FRED PALMER, in his official capacity as a member of the Plumbers & Gas Fitters Examining Board,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

G. THOMAS SULLIVAN
Counsel of Record
VINCENT, HASTY, SULLIVAN,
ELLIOTT & TIDMORE, P.C.
Attorneys for Respondents
2090 Columbiana Rd.
Suite 4400
Birmingham, AL 35216
(205) 979-4490

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25 pp

ISSUES PRESENTED BY PETITION

1. Whether the Petitioner has presented important or substantial federal issues of and in a manner sufficient to serve as a basis to justify issuance of the writ.

2. Whether the Court of Appeals erred in affirming the District Court's grant of a state official's motion for summary judgment on an employee's official capacity claim where the employee was discharged for conduct relating to the mailing of an anonymous letter, and where her activities incident to writing and sending the letter, and her additional activities thereafter, were disruptive, insubordinate, and were accompanied by the use of abusive language, all of which destroyed the atmosphere of mutual trust in her department and impaired the efficient operation of the state Agency.

3. Whether the Court of Appeals erred in affirming the District Court's grant of a state official's motion for summary judgment based on qualified immunity where an employee was discharged by the state official, exercising his discretionary authority, for violating Alabama State Personnel Board rules which prohibit insubordination, disruptive behavior and use of abusive language to a fellow employee, and where the state official was not prohibited from doing so by clearly established law.

TABLE OF CONTENTS

Page

Tables of Contents ii

Table of Citations iv

Respondents' Brief in Opposition to Petition for a Writ of Certiorari 1

Opinion Below 1

Constitutional and Statutory Provision Involved 1

I. Proceedings Below 1

A. Statement of the Case 1

B. Statement of the Facts and Proceedings Below 3

II. Reasons Why the Writ Should Be Denied 6

A. In General 6

B. Official Capacity Claim 7

1. Ford Was Discharged for Insubordination, Disruptive Conduct, and Use of Abusive Language and Not for the Exercise of Protected First Amendment Speech 8

A. Ford's communication was not a matter of public concern, but was a personal complaint about an internal Agency matter 8

(1) The content of Ford's communication was not a matter of public concern, but rather reflected an internal complaint.. 9

(2) The context of Ford's communication did not reflect a matter of public concern but rather reflected an internal complaint 11

TABLE OF CONTENTS – Continued

Page

(3) The form of Ford's speech did not indicate a matter of public concern..... 11

B. Under the *Pickering* balancing test, the State's interests in promoting the efficiency of the Agency outweigh Ford's interests in communicating as she did..... 12

(1) A close working relationship is essential for the Board to fulfill its public functions..... 13

(2) The time, manner and place of Ford's letter further contributed to disruption of the Agency's functions..... 14

(3) The State's interests in ensuring the proper operation of the Agency further outweigh Ford's interests in making the speech..... 15

2. Qualified Immunity..... 17

A. Qualified immunity shields Lawrence's discretionary action in the discharge of Ford... 17

B. Lawrence's discharge of Ford did not violate clearly established law..... 18

Conclusion..... 19

TABLE OF CITATIONS

Page

CASES CITED:

Bryson v. City of Waycross, 888 F.2d 1562 (11th Cir. 1989) 8

Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 (1983) 7, 8, 11, 13, 16

Dartland v. Metropolitan Dade County, 866 F.2d 1321 (11th Cir. 1989) 18

Deremo v. Watkins, 939 F.2d 908 (11th Cir. 1991) 9

Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986) 9, 13

Fikes v. City of Daphne, 79 F.3d 1079 (11th Cir. 1996) 14

Gompers v. Buck's Stove and Range, Co., 221 U.S. 418 (1911) 12

Harris v. Board of Education, 1997 U.S. App. LEXIS 1201 (11th Cir. Jan. 23, 1997) 18

Hansen v. Soldenwagner, 19 F.3d 573 (11th Cir. 1994) 17, 19

Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092 (1986) 19

McIntyre v. Ohio Elections Commissions, 115 S.Ct. 1511 (1995) 12

Morales v. Stierheim, 848 F.2d 1145 (11th Cir. 1988) 14

Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968) 7, 8, 12, 13, 16, 19

Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891 (1987) 8, 16

Sims v. Metropolitan Dade County, 972 F.2d 1230 (11th Cir. 1992) 17

TABLE OF CITATIONS – Continued

Page

Stough v. Gallagher, 967 F.2d 1523 (11th Cir. 1992) 17

Suissa v. Fulton County, GA, 74 F.3d 266 (11th Cir. 1996) 19

STATUTES CITED:

42 U.S.C. §1983 ..... *passim*

Ala. Code §36-26A-1 15

UNITED STATES CONSTITUTION CITED:

United States Constitution, Amendment I 7, 13

OTHER AUTHORITY CITED:

Rules of the Supreme Court; Rule 10 6

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents respectfully request that the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit be denied.

OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals (App. 16a to Petitioner's Brief) was not reported. The judgment and opinion of the lower court is unreported. (App. 1a to Petitioner's Brief).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Ford claimed that the Respondents violated her First Amendment right to free speech under the United States Constitution, Amendment I, and brought this action pursuant to 42 U.S.C. §1983 (Supp. 1997).

I. PROCEEDINGS BELOW

A. STATEMENT OF THE CASE

On July 17, 1995, Debra J. Ford filed a complaint in the United States District Court for the Northern District of Alabama against Edgar Lawrence and others claiming that she had been fired in retaliation for her exercise of

free speech as protected by the First Amendment in violation of 42 U.S.C. §1983 (1994). R1-1-1. After extensive discovery, on August 28, 1996, the District Court granted Defendants' motion for summary judgment. R1-53-1.

This would be the fifth review of Ford's termination. Prior to review by the District Court, Ford received an evidentiary hearing before the Alabama State Personnel Board, at which she was represented by counsel of her selection. The Hearing Officer received testimony and found Ford's discharge for insubordination, disruptive conduct, and use of abusive language to have been justified. R1-52-2-5. R1-25-Exh. A & B. The Alabama State Personnel Board next reviewed and adopted the findings of the Hearing Officer and upheld Ford's discharge, specifically noting that it had searched the record for evidence of mitigation of punishment and found mitigation to be inappropriate. R1-25-Exh. A. Ford next filed her action in District Court. In the District Court's Memorandum Opinion accompanying the Final Judgment, the Court liberally cited the findings of the State Hearing Officer. R1-52-2-5.

Finding Ford's claim of a constitutional violation "anything but clear" , the District Court ruled in favor of Lawrence in the official capacity claim based on the manner and form of Ford's actions, the necessity for a close working relationship in her office, and her attack on Lawrence's integrity, which caused the Court to conclude that Ford, Lawrence, and other employees could not continue to work together in an atmosphere of mutual trust. R1-52-10-11. The District Court then granted summary judgment in favor of Lawrence in his individual capacity based on qualified immunity. R1-52-10. The decision of

the District Court was then reviewed de novo by the U.S. Court of Appeals for the 11th Circuit, and was affirmed on July 18, 1997.

B. STATEMENT OF THE FACTS AND PROCEEDINGS BELOW

Respondents submit the following in clarification of Petitioner's Statement of Facts. Debra Ford was an employee of the Alabama Plumbers and Gas Fitters Examination Board. Edgar Lawrence is a compensated employee, is appointed by the Board as Executive Director and was sued individually and in his official capacity. Board Members are unsalaried political appointees and were sued in their official capacities only. The Board is a State Agency tasked with the enforcement and administration of the state licensing laws relating to plumbers and gas fitters. R1-1-2. Lawrence, as Executive Director, participates in investigations as part of the enforcement aspect of the Board's functions. Exh. 39-23-24.

Lawrence drives a vehicle provided by the State. On August 15, 1994, he received a new 1994 Chevrolet. On or about the same date, following a procedure established under authority of an Alabama Attorney General's Opinion, an ordinary license plate was requested from the Probate Court and obtained for the vehicle. Exh. 39-Exh.1. Lawrence placed it on the vehicle on or about September 13, immediately prior to traveling to Baldwin county for staff meetings with Board compliance officers (a type of inspector) who live and work in the Southern region of Alabama, which includes Mobile and Baldwin counties. Exh. 39-105-106.

On September 14, 1994 Ford spoke with David Wilcox, a compliance officer in the Southern region, and alleges that Wilcox told her the tag was on the vehicle because Lawrence "was going to" use the car to transport his wife to and from a restaurant job in Gulf Shores. She says she questioned Wilcox about how he knew this, and Wilcox said it was "little things" Lawrence said, but that Wilcox did not tell her any of these little things. Exh. 38-59-60. Wilcox denied making these statements. Exh. 41-17-19. At some point prior to September 17, 1994, Ford had searched Board files and photocopied the letter written to the Probate Judge requesting the tag, and the Attorney General's opinion governing the use of and procedure for acquisition of such tags on state vehicles. Prior to September 17, 1994 Ford then wrote an anonymous letter which mentioned that Lawrence's state vehicle had an ordinary license plate, which mentioned that Lawrence had such a plate when cars of field compliance officers did not, and which suggested that Lawrence "appeared to have decided to use" his State vehicle for personal use. The text of that letter will be set out hereafter.

The letter was mailed to four of the Board Members who were not officers. One of these, Danny Price, Ms. Ford had been told personally disliked Lawrence. R. 1-38-61 to 62. Ford gave the letters to a friend with instructions that they should be mailed from anywhere outside Walker County, where she resides. Exh. 38-71-72. The letters were postmarked September 17, 1994 from Huntsville, Alabama.

Within several days, Board members began reporting to Lawrence that they had received the letter. Lawrence

assumed from the context and terminology of the letter that an employee had written it, and, as would be expected, undertook to find out which employee. He reviewed employee itineraries to determine what employees had been in Huntsville during the period of the postmark, circulated copies of the letter within the department and asked certain persons if they knew who had written it. Exh. 39-35-39.

The letter became a topic of general discussion within the department. Exh. 42-57-58. Exh. 41-22. On September 28, 1994, Ford talked at work with three compliance officers, Wilcox, Leonhardi and Davis, and admitted writing the letter. Leonhardi and Wilcox testified that they asked Ford why she had done so and she responded, "Because I hate him [Lawrence]". Exh. 42-199-120. Exh. 41-27. Ford asked them to swear to not tell, and they so agreed. Exh. 41-26-28. On or about October 5, 1994, Leonhardi was questioned by Lawrence and disclosed what Ford had told him. Ford learned that Leonhardi had told, called him a son of a bitch, and informed him that she did not appreciate it and would never tell him anything else. Leonhardi reported that conversation to Lawrence. Ford admitted the conversation, but denied calling Leonhardi a son of a bitch. Exh. 42-90-91. Exh. 38-93-95.

On October 13, 1994 Lawrence called Ford to his office and offered her the option to resign for personal reasons and be placed back on the state job registry or be fired. Exh. 39-100-101. After telephoning her attorney and discussing the matter for over an hour, Ford elected to be terminated. Exh. 39-73. Ford was given notice that she was being terminated for insubordination, disruptive conduct and use of abusive language. Ford appealed to

the Alabama State Personnel Board which ordered an evidentiary hearing before a Hearing Officer, beginning the review process described above.

II. REASONS WHY THE WRIT SHOULD BE DENIED

A. IN GENERAL

Rule 10 sets forth the basic guidelines considered by this Court in determining whether to issue a writ of certiorari. These include a Court of Appeals decision which conflicts with a decision of a Court of Appeals of another circuit, or that the Court of Appeals has so departed, or sanctioned such a departure by the District Court, from the accepted and usual course of judicial proceedings as to call for exercise of this Court's supervisory power. (Rule 10(a)) Rule 10(c) adds as a basis that the Court of Appeals has decided an important federal question in a way which conflicts with relevant decisions of this Court. Rule 10 concludes with the admonition that the "writ of certiorari is rarely when an asserted error consists of erroneous factual findings or misapplication of a properly stated rule of law".

Petitioner advances no case from any other circuit with which the decisions of the United States District Court for the Northern District of Alabama or the 11th Circuit Court of Appeals directly conflict. Neither has Petitioner cited any decision of this Court with which the District or Court of Appeals decisions conflict. Petitioner's argument questions the sufficiency of the evidence, the District Court's findings of fact and

application of existing law, the quantum of evidence presented to and considered by that Court on pivotal points, and advances argument with respect to how the content of Petitioner's speech should be characterized. As such, the Petitioner simply fails to assert any generally recognized basis for grant of the writ.

B. OFFICIAL CAPACITY CLAIM

Ford claims that she was wrongfully discharged in retaliation for her exercise of protected First Amendment speech. This Court would be called on to examine this claim under the *Connick* and *Pickering* tests. First, this Court would have to determine whether Ford's letter was a matter of public concern under *Connick*. In the *Connick* analysis, the Court would examine the content, form, and context of the letter. If it found public concern, this Court would proceed to determine whether under the *Pickering* balancing test, the State's interests in promoting the efficiency of the Agency outweighed Ford's interests in mailing the letter. In the *Pickering* analysis, the Court would examine the relationship between the parties involved, and the time, manner, place, and context of the speech.

The Courts found that the manner and form of Ford's letter and the need for a close working relationship between the parties involved provided a showing that the State's interests outweighed Ford's and that there was no constitutional violation involved. That decision involved application of properly stated principles of law and did not conflict with decisions of any other circuit or this Court.

1. Ford Was Discharged for Insubordination, Disruptive Conduct, and Use of Abusive Language and Not for the Exercise of Protected First Amendment Speech.

In order to prove her §1983 claim, Ford would have to first establish that the subject speech was of public concern. Having crossed the threshold, she must then survive a balancing test, initially showing that the right to communicate as she did outweighs the interest the State seeks to protect. If so, Ford would then have to establish that the content of the speech was a substantial part of the cause for termination. Only after Ford had cleared these hurdles would the State have to show that its response would have been the same irrespective of the protected conduct. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968), *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684 (1983) and *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 2896-97 (1987).

A. Ford's communication was not a matter of public concern, but was a personal complaint about an internal Agency matter.

At the first stage, the Court would examine the threshold issue of whether the employee's speech may be 'fairly characterized as constituting speech on a matter of public concern'. *Connick*, 461 U.S. 138, *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989). "If [Plaintiff's] speech cannot fairly be characterized as constituting speech on a matter of public concern, the inquiry is at

an end." *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir. 1986).

Whether an employee's communication constitutes a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record. *Deremo v. Watkins*, 939 F.2d 908, 910, 911 (11th Cir. 1991) In applying the "content, form and context" analysis this Court would consider whether the communication was made in the employee's role as citizen or employee and the employee's motivation in speaking. *Deremo*, 939 F.2d 910-11.

(1) The content of Ford's communication was not a matter of public concern, but rather reflected an internal complaint.

Ford did not report public corruption, or even improper use of public property. Ford complained about Lawrence's assignment of equipment to personnel within her Agency with which she did not agree. Secondly, she falsely attacked and impugned her supervisor based on no evidence, and she directed the accusation intentionally to a Board member who she believed personally disliked him with the intent to cause him harm. (Exh. 38-61-62).

Ford's anonymous communication, in its entirety, is as follows:

> "Why is it that the Executive Director of the State of Alabama Plumbers and Gas Fitters Examining Board, Mr. Edgar Lawrence, is driving a 1994 Caprice automobile bought and paid for by that Agency without a State License Plate

> or any other markings on it to identify it as a State owned vehicle? This automobile is being driven around with a regular license plate on it. I think it very suspicious that Mr. Lawrence is the one who has this type of license plate on his vehicle *when the Compliance Officers for this Agency who actually go out in the field to investigate complaints do not have them also.* It would appear that Mr. Lawrence has decided to use this vehicle for his own personal use instead of just for STATE OF ALABAMA *business* as it was intended for it to be used. Sincerely yours, A VERY CONCERNED CITIZEN" [*Italics added*] Exh. 38-Exh. 1.

It is clear from the italicized portion of the letter that Ford was primarily concerned that the Executive Director, who she considered an administrator, had a private tag when field compliance officers did not, a matter of purely internal Agency concern. Ford freely admitted this in her deposition. (Exh. 38-79-80, 38-82-83, 38-127-128).

Ford also kept notes to memorialize her conversations with fellow employees and Lawrence. According to Ford, as recorded in her notes, on the morning of her termination Lawrence first showed her the letter and asked if she had written it, which she then admitted. She then stated that the compliance officers should be given the ordinary tags, since they did the investigating. (Exh. 38-6). Ford also did not say that Lawrence's use of the tag was wrong. His conduct was "suspicious" only because field compliance officers did not "also" have the tags. Exh. 38-Exh. 1.

The letter clearly states that Ford's personal complaint as an employee. It was so motivated and was not

the effort of a citizen informing the public through protected speech. The only theme therein addresses the fact that the Executive Director had a piece of equipment, a tag, supposedly more suitable for enforcement than the "troops in the field" and that Ford disagreed with his decision.

(2) The context of Ford's communication did not reflect a matter of public concern but rather reflected an internal complaint.

The tone and context of Ford's communication was a confrontational questioning of a discretionary decision made by her Agency head. "When a government employee personally confronts his immediate superior, the employing Agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time and place in which it is delivered." *Connick,* 461 U.S. at 153. Even Ford admits that her actions questioned Lawrence's authority.

(3) The form of Ford's speech did not indicate a matter of public concern.

Ford's communication was without foundation and was recklessly made at best. It is more appropriately categorized as the spreading of a false rumor than an effort to raise public consciousness. Assuming even that she was not out to "get" Lawrence, the form of Ford's letter reflected a mindset to recklessly shoot first and ask questions later. Its anonymous form and vague allegations were a smear against which Ford knew Lawrence

would have to try to defend himself, and that form insured discord and disruption within the Agency he led. An element of personal responsibility attaches to an exercise of free speech. Justice Holmes long ago opined that the right does not extend to the right to cry "fire" in a crowded theater. *Gompers v. Buck's Stove and Range, Co.*, 221 U.S. 418, 439 (1911)

Petitioner cites *McIntyre v. Ohio Elections Commissions*, 115 S.Ct. 1511, 1516 (1995) for the proposition that anonymous communications are essentially absolutely protected. However *McIntyre* an elections case, is easily distinguished because it involved constitutionality of a statute which regulated "core political speech", a topic subject to "exacting scrutiny", and such a statute must always be narrowly construed. 115 S. Ct. 1511, at 1519. While noting that the right is broader than politics, this Court indicated that anonymity is generally favored where "literary endeavors" and other communications which cause such works to "enter the marketplace of ideas" are involved. *McIntyre*, 115 S.Ct. at 1516. Such does not describe a workplace complaint.

B. Under the *Pickering* balancing test, the State's interests in promoting the efficiency of the Agency outweigh Ford's interests in communicating as she did.

The *Pickering* balancing test requires a Court to balance the interests of the employee as a citizen in commenting upon matters of public concern and the State's interests as an employer in promoting the efficiency of the public services it performs through its employees.

Pickering, 391 U.S. at 568. In weighing the competing interests, the Court would consider the following factors: (1) whether a close working relationship is essential to the State Agency's public responsibilities; (2) the time, manner, and place of the speech; and (3) the context within which the speech was made. *Ferrara v. Mills, Supra*, at 1512.

(1) A close working relationship is essential for the Board to fulfill its public functions.

Assuming that Ford's letter contained information of limited public concern, such a limited First Amendment interest would not require Lawrence to tolerate behavior which would disrupt the office, undermine his authority, impair efficient operations and harm close working relationships. *Connick*, 461 U.S. at 154. Further, the maintenance of harmony among the Agency's coworkers is taken into consideration. *Pickering*, 391 U.S. at 570. A close working relationship between Ford, the compliance officers in the field, and Lawrence, is necessary for the proper functioning of the Agency. *See id.*

Only five employees, including Ford, worked in the Board's Birmingham office. Exh. 42-39-40. Due to the tenure of most of the office personnel it was also cohesive. Exh. 39-90. Also, much of the Board's work is in compliance administration and enforcement, and Ford was the liaison between the home office and the compliance officers in the field. Exh. 42-112. In order for the Board to enforce the licensing laws, information had to be reported by or to a compliance officer through Ford.

The compliance officers and office staff were upset by the fact that Ford was willing to remain silent as to writing the anonymous letter. When the other compliance officers pointed out to Ford that the wrong person might be disciplined for her letter, Ford said she did not care. Exh. 42-100-103. Exh. 39-86-90. At least one of the compliance officers felt that his trust in Ford had been destroyed. Exh. 42-122. Leonhardi testified that it would have been difficult for him to work with Ford because her behavior had impaired her relationship with the field officers. (*Id.*) Lawrence testified that the rest of the office workers were so upset by the letter that they were unable to do their work. Exh. 39-86. Lawrence also testified that the Agency's work was disrupted and that licensing deficiencies were not corrected during this period. (*id.* at 105.)

(2) The time, manner, and place of Ford's letter further contributed to disruption of the Agency's functions.

The time, manner, and place of the communication can contribute to the disruption of the state Agency's functions. *Morales v. Stierheim*, 848 F.2d 1145, 1150 (11th Cir. 1988). Ford did not choose to express her allegations at a time, manner, and place so as to minimize possible disruptions to the Agency. *See Fikes v. City of Daphne*, 79 F.3d 1079, 1084 (11th Cir. 1996). Instead she recklessly published them. She also does not distinguish the concept of communicating her concerns privately with her employer from that of anonymous letter writing. She in fact chose this form of communication over the right to

communicate privately with her employer. She also did not take advantage of the procedures established under Alabama law which insure that any state employee reporting wrongdoing is protected against retaliation in the workplace (the Alabama State Employees Protection Act), Code of Alabama (1975) 36-26A-1. Availability of such a procedure should be balanced against the need of an employee to send anonymous letters.

Additionally, Ford knew that an accusatory communication sent in an anonymous manner from a misleading location would cause suspicion to fall upon her coworkers in the Agency. Exh. 42-121. Thus, the manner and place selected by Ms. Ford to make her communication knowingly caused suspicion to fall upon her coworkers and brought disruption into the workplace. This suspicion alone caused disruption in the Agency.

(3) The State's interests in ensuring the proper operation of the Agency further outweigh Ford's interests in making the speech.

As she was field liaison, the compliance officers were required to channel office communication through Ford. Exh. 42-112. Leonhardi testified that after Ford expressed willingness to let others take the blame, it would have been difficult for him to rely on her enough to be able to work with her. Exh. 42-122. He also stated that other field officers, including the North Alabama employees being suspected, were required to have the same contact with

her as he. Employees did not want to deal with Ford after it became known she had written the letter. Exh. 39-84.

Interference with work, personnel relationships, or the speaker's job performance can impair the public employee's effectiveness, and avoiding such interference can be a strong state interest. *Rankin*, 483 U.S. 378, 384. The State's interest is "in promoting efficiency of the services it performs through its employees". *Pickering*, 391 U.S. at 563. Pertinent considerations are "whether the statement impairs discipline by supervisors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary or impedes performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. 378, 388, citing *Pickering*, 391 U.S. 570-573. All of the foregoing resulted in this case.

"Government, as an employer, must have wide discretion and control over the management of its personnel and its internal affairs. This includes the prerogative to remove employees where conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony and ultimately impair the efficiency of an office or Agency." *Connick*, 461 U.S. 138, 151. The State's interest to be protected was real and substantial.

2. QUALIFIED IMMUNITY

A. Qualified Immunity shields Lawrence's discretionary action in the discharge of Ford.

As to Ford's individual capacity claim, this Court would be called on to examine whether Lawrence is entitled to qualified immunity. In that analysis, this Court would determine whether Lawrence was acting within his discretionary authority, and whether he violated clearly established law in discharging Ford. The Court of Appeals decision again involved application of a properly stated rule of law and did not conflict with other circuits or a prior decision of this Court.

Lawrence asserted qualified immunity as an affirmative defense to Ford's claim. "Qualified immunity protects government officials performing discretionary functions from civil liability if their conduct does not violate a 'clearly established statutory or constitutional right of which a reasonable person would have known'." *Hansen v. Soldenwagner*, 19 F.3d 573 (11th Cir. 1994). Lawrence would first have to show that he was acting within the scope of his discretionary authority in discharging Ms. Ford. *See Stough v. Gallagher*, 967 F.2d 1523, 1526 (11th Cir. 1992). Once Lawrence met this initial burden, the burden would shift to Ms. Ford to prove that Lawrence's conduct violated clearly established law. *See Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1236 (11th Cir. 1992).

The Examining Board, as a state Agency, must deal with employees in accordance with the rules and regulations of the Alabama State Personnel Board. Personnel

Board regulations classify, prohibit and permit sanctions for "insubordination", "abusive language" and "disruptive conduct". Ford was discharged by Lawrence for these causes in this case. The Board had delegated authority for operational decisions to Lawrence. Exh. 40-23-24. Thus, Lawrence was acting within his discretionary authority as Executive Director in discharging Ms. Ford for violating these regulations.

B. Lawrence's discharge of Ford did not violate clearly established law.

Ford cannot demonstrate that a reasonable government official faced with the same circumstances which faced Lawrence would have had reason to know that her discharge could be a clear violation under 42 U.S.C. §1983. "Government officials are shielded from suit unless the Court is convinced that 'the legal norms allegedly violated by the Defendant were clearly established at the time of the challenged actions or, . . . the law clearly proscribed the actions the Defendant . . . took' ". *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1322 (11th Cir. 1989). Lawrence believed and had no reason to not believe that his actions were lawful in light of clearly established law. *Harris v. Board of Education*, 1997 U.S. App. LEXIS 1202 (11th Cir. Jan. 23, 1997).

Further, an official is also immune from liability if the applicable law is unclear. "Only in the rarest of cases will reasonable government officials truly know that the termination or discipline of a public employee violated 'clearly established' federal rights. When 'no bright-line standard puts the reasonable public employer on notice

of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where *Pickering* balancing would lead to the inevitable conclusion that the [act taken against] the employee was unlawful." *Hansen*, 19 F.3d at 576. "The qualified immunity defense . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092 (1986).

"For Qualified Immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like situated, reasonable government agent that what the Defendant is doing violates federal law in the circumstances." *Suissa v. Fulton County, GA*, 74 F.3d 266, 270 (11th Cir. 1996). It is clear that Lawrence had no reason to suspect that terminating Ford was or could be a violation of §1983.

CONCLUSION

Based on the above, Lawrence respectfully requests that this Court deny Ford's petition for a writ of certiorari.

Respectfully submitted,

G. Thomas Sullivan
Counsel of Record
Vincent, Hasty, Sullivan,
Elliott & Tidmore, P.C.
2090 Columbiana Road, Suite 4400
Birmingham, Alabama 35216
(205) 979-4490